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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 TONY GOODRUM,

11 Petitioner,

12
13 vs.

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15 TIMOTHY E. BUSBY, Warden,

16
17 Respondent.
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Civil No. 11-2262 IEG (JMA)

20 **ORDER:**

21 **(1) DENYING REQUEST FOR**
22 **EVIDENTIARY HEARING;**

23 **(3) DENYING REQUEST FOR**
24 **DISCOVERY CONCERNING LAW**
25 **ENFORCEMENT OFFICERS [ECF**
26 **No. 5.]; and**

27 **(3) DISMISSING CASE WITH**
28 **PREJUDICE AND WITHOUT LEAVE**
TO AMEND.

On September 23, 2011, Petitioner, Tony Goodrum (hereinafter "Petitioner"), a state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in this Court challenging his San Diego Superior Court conviction in case number SCD170068 for voluntary manslaughter and personal use of a firearm.¹ (Pet. 1.)

¹In March 2003, Petitioner was convicted of voluntary manslaughter with the personal use of a firearm pursuant to California Penal Code sections 192(a) & 12022.5(a)(1). (See Reply Exhibit re Diligence 107 [ECF No. 22-2].) Petitioner also pleaded guilty to possession of a firearm by a felon under California Penal Code section 12021(a)(2), and was sentenced to 21 years in state prison. (*Id.*)

On November 9, 2011, Petitioner filed an amended Petition which is the operative pleading in this case.² [ECF No. 10.] Petitioner previously filed a Petition for Writ of Habeas Corpus in this Court in case number 07cv0752³ challenging the same San Diego Superior Court conviction, and has been granted leave to file a second or successive petition by the Ninth Circuit Court of Appeals. The Court now considers whether Petitioner's current application meets the standard pursuant to 28 U.S.C. § 2244 to permit Petitioner to proceed with a successive petition in this Court. After careful review of Petitioner's Petition and exhibits⁴, the Response by Respondent, Petitioner's Reply and its attachments, the Court finds that Petitioner has not met the requirements of 28 U.S.C. § 2244(b)(2)(B) for filing a second or successive habeas petition pursuant to 28 U.S.C. § 2254.

I. PROCEDURAL BACKGROUND

Petitioner previously filed a Petition for Writ of Habeas Corpus in this Court in case number 07cv0752 challenging the same San Diego Superior Court conviction for voluntary manslaughter and personal use of a firearm, which was denied on the merits on September 6, 2008. (See Order in case no. 07cv0752 IEG (JMA) Goodrum v. Cate, ECF No. 31.) On June 22, 2007, during the pendency of that case, Petitioner filed an Application for Leave to File a Second or Successive Petition with the Ninth Circuit Court of Appeals. (See Application for Leave to File Second or Successive Petition in Goodrum v. Kramer, No. 07-72512, Jun. 22, 2007.) On September 13, 2007, the appellate court denied the application "without prejudice to refiling should petitioner receive an unfavorable disposition of the first petition that is currently pending in the district court." (See Order in Goodrum v. Kramer, No. 07-72512, Sep. 13, 2007.) After the denial of his first federal

²For purposes of clarity the Court refers to page numbers inserted electronically upon the filing of Petitioner's First Amended Petition.

³The case was originally designated 07cv0752 JAH (JMA), and was subsequently transferred and re-designated 07cv0752 IEG (JMA).

⁴The Court references exhibits attached to the original petition in light of the fact that Petitioner did not re-submit those exhibits when he filed his amended petition.

petition and its affirmance on appeal, Petitioner filed a second Application for Leave to File a Second or Successive Petition. (See App. for Leave to File Second or Successive Pet. 4-5, Goodrum v. Busby, 10-73336, Oct. 29, 2010.) Petitioner's application was granted by the Ninth Circuit Court of Appeals on August 31, 2011. (See Goodrum v. Busby, 10-73336, Aug. 31, 2011.) Following the Ninth Circuit's order, Petitioner filed the instant Petition on September 23, 2011.

On October 7, 2011, the Court issued an Order to Show Cause for the parties to brief the narrow issue as to whether the Petition met the requirements of 28 U.S.C. § 2244(b)(2)(B) for bringing a second or successive petition. [ECF No. 3.] On January 20, 2012, Respondent filed a Response to Order to Show Cause. [ECF No. 16.] Petitioner filed his Reply on April 10, 2012. [ECF No. 24.]

II. FACTUAL BACKGROUND

The Court gives deference to state court findings of fact and presumes them to be correct; Petitioner may rebut the presumption of correctness, but only by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1)(West 2006); see also Parke v. Raley, 506 U.S. 20, 35-36 (1992) (holding that findings of historical fact, including inferences properly drawn from such facts, are entitled to statutory presumption of correctness). The facts as found by the state appellate court are as follows:

Goodrum lived with his girlfriend Ieisa Wilson, her two children, and another couple in a house on Brookhaven Road. Goodrum and the victim, Dwayne Stamps, were friends. About a year earlier Stamps had rented a room in the Brookhaven house for a few months. In the past, Goodrum and Stamps had argued, even to the point of pushing or shoving each other, but they had never had a fist fight and Stamps had never made any threats to kill Goodrum or anyone else. Goodrum and Stamps had not seen each other for several months. Some animosity had developed between them because Stamps had borrowed and not returned Wilson's car (Wilson and Goodrum viewed it as a theft of Wilson's car).

On September 24, 2002, Stamps had been terminated from a drug rehabilitation program, his girlfriend Lorraine Murray had complained about not being happy with the relationship, and he had backed her vehicle into a pole or tree, damaging it. After stopping at a bar, Stamps and Murray drove to the Brookhaven residence, arriving about 9:00 p.m. At the time of his death, about 30 minutes later, Stamps had a blood alcohol level of .17 percent.

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1 When Stamps and Murray arrived, the garage door to the Brookhaven
2 residence was propped open six to seven inches with a pipe. The lights were on
3 in the garage, which was often used by the residents of the house as an
4 additional living space. Goodrum was inside the garage with a woman playing
5 dominoes. Goodrum, the woman, and her friend had used methamphetamine that
6 day "for a few hours at least." When Stamps knocked loudly on the garage door,
7 Goodrum responded by opening the door. Stamps walked in and said he was
8 looking for Jason Cruz who had his earring and other belongings. He was rude
9 to the woman, suggesting in a lewd manner that he knew her and told her that
10 if she saw Cruz to tell him that he was going to kill him.

11 Stamps entered the house, took Wilson into the bedroom and accused her
12 of saying "mean things" about him. According to Wilson, Stamps threatened to
13 kill her. When Goodrum entered the bedroom, Stamps accused Goodrum of
14 having his diamond earring. Goodrum said the earring was in a duffel bag,
15 which he took out of a closet, carried out to the garage, and set down in front of
16 Murray's vehicle. Stamps and Goodrum argued in the garage and exchanged
17 blows both in the garage and in front of Murray's vehicle. According to
18 Goodrum, Stamps said he was going to get a gun and shoot everyone in the
19 house.

20 Stamps went to Murray's vehicle and pulled out a roofing hammer, which
21 was described as looking like a tomahawk, hatchet, or axe. According to
22 Goodrum, Stamps threatened, "I'm gonna fuck you up. I'm gonna fuck you up."
23 Goodrum pulled out a knife and picked up a trash can with his other hand. The
24 men continued arguing but did not raise their weapons. Goodrum told Stamps
25 to leave.

26 There were other people in the garage area, including the woman with
27 whom Goodrum had been playing dominoes, Murray, and Goodrum's friend
28 Howard Herring. According to some of the witnesses, things calmed down; both
men put down their weapons, they hugged, Stamps apologized, and said he
loved Goodrum as a brother. According to Goodrum, things did not calm down.
Stamps made a comment that he was "gonna get [his] strap and shoot everybody
in the house." Goodrum responded he was going into the house and when he
came back he was "gonna be shootin' sparks." Goodrum retrieved a rifle from
between the mattress and box springs of the bed in the master bedroom. He
cocked the rifle in the bedroom.

When Goodrum entered the garage with the rifle, Stamps stood near the
rear of the driver's side of a car parked in the garage. When Stamps became
aware of the gun, he said something like, "Go ahead and shoot me." According
to several witnesses, including neighbors, Stamps was not holding anything in
his hands. A neighbor across the street saw Goodrum advance toward Stamps.
Herring and Goodrum, as well as another neighbor, testified Stamps started
walking toward Goodrum. Goodrum fired twice at Stamps, hitting him once in
the head and once in the chest.

Herring testified that after the first shot, Stamps turned, grabbed his
stomach and said something like, "I can't believe you shot me." Herring saw
blood in the area of Stamps's heart. As Stamps turned, Goodrum fired a second
shot and Stamps collapsed to the ground. According to Murray, the first shot hit
Stamps in the face and he staggered. The second one hit him in the heart, he fell
to the ground, and Goodrum was preparing to fire again when Murray shouted
at him to stop.

1 According to Goodrum, when he entered the garage, Stamps commented
 2 in a sarcastic or mocking tone of voice, "Oh, he's got a gun. What are you gonna
 3 do with a gun?" Goodrum thought Stamps was hiding something behind his
 4 back, possibly a gun. Stamps kept advancing despite Goodrum's warning him
 5 that he was going to shoot if Stamps came any closer and that he was "a damn
 6 good aim." Goodrum fired when Stamps started moving a pipe from behind his
 7 legs. After the first shot, Stamps continued to swing the pipe up, so Goodrum
 8 fired again. A pipe was later found near Stamps's body.

9 Stamps died as a result of the gunshot wounds, either of which was
 10 potentially fatal. The head wound likely would have caused immediate
 11 unconsciousness and it would have been unlikely Stamps would have been able
 12 to speak or move after the wound was inflicted. The barrel of the rifle was two
 13 feet or further from the head wound when it was inflicted. In contrast, the barrel
 14 of the rifle was touching or nearly touching Stamps when the chest wound was
 15 inflicted. It is possible that if the chest wound were inflicted first that Stamps
 16 might have remained standing and able to speak.

17 Goodrum presented evidence that after the shooting Murray had told
 18 some people that earlier in the evening Stamps stated he thought he was going
 19 to die that night and purposely drove into ongoing traffic and hit a light pole, in
 20 an effort to kill them both. She said Stamps was upset about being terminated
 21 from the drug rehabilitation program and was afraid if he "got a dirty test" he
 22 would be sent back to jail. He told her he was not going back to jail; they would
 23 have to kill him first. She also said Stamps had grabbed a pipe and had advanced
 24 toward Goodrum. Murray denied making any of these statements.

25 (Response 2-3, citing People v. Goodrum, 2004 WL 1854188, *1 -2 (Cal. App. 4 Dist.,
 26 2004).)

27 **III. DISCUSSION**

28 A petitioner proceeding with a second or successive petition where the Ninth Circuit
 has granted leave to file a successive petition, must satisfy the requirements of 28 U.S.C.
 section 2244 or the district court shall dismiss any claim presented. See 28 U.S.C. § 2244
 (b)(4). Under section 2244 (b)(2):

A claim presented in a second or successive habeas corpus application
 under section 2254 that was not presented in a prior application shall be
 dismissed unless

(A) the application shows that the claim relies on a new rule of
 constitutional law, made retroactive to cases on collateral review by the
 Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been
 discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the
 evidence as a whole, would be sufficient to establish by clear and convincing
 evidence that, but for constitutional error, no reasonable factfinder would
 have found the applicant guilty of the underlying offense.

1 28 U.S.C. § 2244(b)(2)(West 2006).

2 In his First Amended Petition, Petitioner includes claims asserting that: 1) his trial
3 counsel was ineffective at his preliminary hearing and trial; 2) his sentence was
4 unconstitutionally enhanced in violation of his plea agreement; and 3) the conviction
5 should be reversed under the doctrines of the “close case” and cumulative error. (Pet. 10,
6 105, 125.)

7 As a threshold matter, Petitioner argues that section 2244 does not apply to his
8 Petition because the Ninth Circuit should have construed his initial request to file a
9 successive petition as a motion to amend the pending petition in case number 07cv0752,
10 citing Woods v. Carey, 525 F.3d 886 (9th Cir. 2008), in support. (Reply 12.) After
11 construing the request as a motion to amend, Petitioner contends the Ninth Circuit should
12 have transferred the action to this Court pursuant to 28 U.S.C. § 1631.⁵ (Id. at 5-6.)
13 Petitioner argues that due to the Ninth Circuit’s failure to transfer the petition and its
14 misleading denial of the request to file a successive petition which actively led him to
15 believe he had to wait until the conclusion of state proceedings to amend the claims in this
16 Court, the “instant writ [is] a timely ‘first writ’ not subject to (28 U.S.C. § 2244).” (Reply
17 6.) Further, Petitioner claims he is entitled to statutory tolling from February 10, 2005 to
18 June 13, 2007, while he exhausted the claims in state court, and that he is entitled to
19 equitable tolling from June 14, 2007 forward because he was diligent in discovering the
20 new evidence and exhausted his claims in a timely fashion. (Reply 6, 13, 16.)

21 Alternately, if the Court were to determine that Petitioner’s claims are subject to the
22 second or successive gatekeeping standard of section 2244, Petitioner argues that his claims
23 meet this standard, or the gateway standard of Schlup v. Delo, 513 U.S. 299 (1995), for
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25 ⁵ Section 1631 states:

26 Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal,
27 including a petition for review of administrative action, is noticed for or filed with such a court
28 and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of
justice, transfer such action or appeal to any other such court in which the action or appeal
could have been brought at the time it was filed or noticed, and the action or appeal shall
proceed as if it had been filed in or noticed for the court to which it is transferred on the date
upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. §1631.

1 actual innocence claims, because the evidence is new and demonstrates that he is actually
2 innocent of the crime for which he was convicted. (Reply 16; First Amended Petition
3 “Pet.” 22, 37.)

4 Respondent contends that the Court should dismiss the currently pending Petition
5 because the factual predicates for Petitioner’s current claims were discoverable or known to
6 Petitioner by 2005, yet he failed to present these claims in his 2007 federal petition, and has
7 not proffered any new factual predicates to support the claims. (Response to Order to
8 Show Cause 11.) Respondent further argues that even if Petitioner can demonstrate the
9 novelty of the factual predicates, “no new facts are of such quality that they would prevent
10 a reasonable factfinder from concluding that Goodrum is guilty.” (*Id.*)

11 **A. Section 2244 Applies to Petition**

12 The Ninth Circuit has stated that, although AEDPA does not provide a definition of
13 what constitutes a second or successive petition, “it is clear that for a petition to be ‘second
14 or successive’ . . . , it must at a minimum be filed subsequent to the conclusion” of a
15 proceeding in which a final disposition has been reached. *Woods*, 525 F.3d at 890 (citing
16 *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002)). In *Woods*, the Ninth Circuit
17 held that the district court should have construed a second petition filed by a pro se
18 petitioner as a motion to amend the pending petition, rather than as a second or successive
19 petition, reasoning that pro se pleadings are to be liberally construed and that if the
20 petitioner had been represented by counsel, he would not have filed a second habeas
21 petition but instead would have filed a motion to amend the pending petition. *Id.*

22 Unlike the petitioner in *Woods* who filed a second petition in the same court in
23 which his first petition was filed, Petitioner here did not attempt to file a second habeas
24 petition in this or any court, but instead requested leave to file a second or successive
25 petition in the Ninth Circuit. The appellate court properly denied the application with
26 notice that Petitioner could re-file his request once he received a disposition on the pending
27 petition in case number 07cv0752. (See App. for Leave to File Second or Successive Pet.
28 *Goodrum v. Kramer*, No. 07-72512, Jun. 22, 2007; Order *Goodrum v. Kramer*, No. 07-

1 72512, Sep. 13, 2007.) Although courts are tasked with construing pro se pleadings
2 liberally, the Ninth Circuit had no reason to believe Petitioner was attempting to amend his
3 pending petition, rather than move to proceed with a second or successive petition before
4 that court, and Woods does not provide controlling authority for that proposition.
5 Petitioner fails to demonstrate that the appellate court erred by deciding the motion for
6 leave to file a second petition.

7 Moreover, there is no merit to Petitioner's contention that the appellate court should
8 have transferred the request to the district court to allow Petitioner to amend the pending
9 petition in case number 07cv0752, because there was no basis for the appellate court to
10 invoke the power of section 1631 to transfer the action. (Reply 1.) A court may transfer a
11 civil action where it "finds that there is a want of jurisdiction . . . to any other such court in
12 which the action or appeal could have been brought at the time it was filed or noticed." 28
13 U.S.C §1631. Section 1631 contemplates that a court may transfer an action when it does
14 not have jurisdiction, but here, the Ninth Circuit had jurisdiction, and in fact was the only
15 appropriate forum for that request, therefore transfer was not required. See 28 U.S.C.
16 § 2244(b)(3)(A). Accordingly, the present Petition, which seeks to challenge the same
17 conviction Petitioner previously challenged in case number 07cv0752, is properly
18 considered a second or successive petition. As such, in order to consider the Petition,
19 Petitioner must demonstrate that he has new evidence which could not have been
20 discovered through due diligence prior to filing his prior petition, and that the evidence
21 demonstrates that Petitioner suffered a constitutional violation in his state court conviction.

22 **B. Second or Successive Petition**

23 "Generally, a new petition is 'second or successive' if it raises claims that were or
24 could have been adjudicated on their merits in an earlier petition." Cooper v. Calderon,
25 274 F.3d 1270, 1273 (9th Cir. 2001). Section 2244 does not explicitly define how a
26 petitioner may demonstrate compliance with the section, however, the Ninth Circuit has
27 concluded that a petitioner must do more than make another prima facie showing. See
28 Bible v. Schriro, 651 F.3d 1060, (9th Cir. 2011) ("A prima facie showing is a sufficient

1 showing of possible merit to warrant a fuller exploration by the district court, and we will
2 grant an application for an [second or successive] petition if it appears reasonably likely
3 that the application satisfied the stringent requirements for the filing of a second or
4 successive petition.”) Further, “[a]district court must conduct a thorough review of all
5 allegations and evidence presented by the prisoner to determine whether the motion meets
6 the statutory requirements for the filing of a second or successive motion.” United States
7 v. Villa-Gonzalez, 208 F.3d 1160, 1164-65 (9th Cir. 2000). For instance, in order to
8 demonstrate that he has acquired new evidence, Petitioner must show he could not have
9 previously discovered the facts underlying his claim through the exercise of due diligence.
10 Babbitt v. Woodford, 177 F.3d 744, 746 (9th Cir. 1999). It is generally held that evidence
11 discovered prior to the filing of a previous habeas petition is not considered new for
12 purposes of section 2244 because it could have been introduced in support of claims
13 contained within the prior petition, which in this case is the petition filed in case number
14 07cv0752. See Hill v. State of Alaska, 297 F.3d 895, 898 (9th Cir. 2002) (finding second
15 or successive doctrine to be derivative of the abuse of writ doctrine which found abuse
16 when petitioner did not raise a habeas claim that could have been raised in an earlier
17 petition); Cooper, 274 F.3d at 1275 (petition containing claim resting on facts known to
18 petitioner at the time he filed his earlier, unsuccessful habeas petition was barred under
19 second or successive doctrine); see also Randy Hertz and James S. Liebman, Federal
20 Habeas Corpus Practice and Procedure, Sixth Edition §28.3 n. 147 (Matthew Bender)
21 (multiple circuits hold that a factual predicate is considered previously discoverable if it
22 could have been discovered at the time of the previous habeas petition).

23 After careful review of Petitioner’s claims and the evidence he presents in support,
24 as discussed below, the Court concludes that Petitioner has not provided any newly
25 discovered evidence supporting the following claims that he could not have previously
26 discovered through the exercise of due diligence.

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1 **1. Ground One- Ineffective Assistance of Counsel**

2 Goodrum makes a lengthy argument that his trial counsel failed to provide adequate
3 assistance at the preliminary hearing and during trial. (Pet. 45-139.) In particular,
4 Petitioner contends that trial counsel: (1) failed to conduct adequate pre-trial investigation
5 including locating and interviewing witness Howard Herring, a.k.a. "Polo," who provided
6 testimony about whether the victim held a weapon during the altercation, and regarding
7 police department misconduct (id. at 47, 65-67, 73); (2) failed to correct various
8 inaccuracies in the probable cause affidavit including a statement from Detective Rivera
9 that it was reported that the victim was on the ground when Petitioner fired the second shot
10 (id. at 49, 51-53); (3) failed to investigate the presence of blood on the victim's hands (id.
11 at 18), and (4) failed to object to the testimony of the victim's girlfriend Lorraine Murray,
12 which was contradictory and allegedly manipulated by contact with law enforcement. (Id.
13 at 19-22.) Petitioner also contends that counsel's inadequate investigation regarding
14 witnesses such as Herring allowed Detectives Rivera and Sergott to testify falsely without
15 being impeached. (Id. at 63.) Petitioner claims he was bound over on the strength of the
16 testimony of witness Murray, and as well as Herring's statements to Detective Rivera, but
17 that if counsel had conducted sufficient investigation, these witnesses would have been
18 impeached and there would not have been enough to move forward on the charges. (Pet.
19 63, 75.) Petitioner also asserts that he received inadequate assistance during trial because
20 counsel: (1) failed to hire a fingerprint expert to examine the metal pipe allegedly held by
21 the victim (id. at 78, 79, 83); (2) failed to move for a mistrial due to law enforcement's
22 deliberate failure to preserve evidence (id. at 85), (3) failed to make a motion to seek
23 discovery of law enforcement impeachment evidence under Pitchess v. Superior Court, 11
24 Cal. 3d 531 (1974)⁶; (4) failed to ensure that the jury would be instructed regarding the use
25 of self defense within one's home to defend against an intruder (id. at 122); and (5) failed

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28 ⁶Pitchess permits a defendant to move to discover information contained in law enforcement officers' personnel files which is relevant to issues in the current case, such as prior incidents of falsifying information or planting evidence. If a defendant is entitled to such discovery, the judge conducts an in camera review of the files to determine if any discoverable information is contained therein. Any relevant evidence is then turned over to the defendant. See Pitchess, 11 Cal. 3d 531 (1974).

1 to conduct reasonable investigation to discover the prosecutorial misconduct arising from
2 the introduction of testimony of law enforcement personnel. (Id. at 63, 65, 76.) Petitioner
3 claims that between August 2003 and September 2005 he “obtained various documents and
4 affidavits and evidence which was not available or admissible for use on direct appeal.”
5 (Pet. 37.)

6 Respondent counters that the allegedly newly discovered evidence consists largely
7 of documents that were either presented to the defense in pretrial discovery, were available
8 through due diligence by the time of conviction, or that Petitioner possessed when he filed
9 his federal petition in 2007, and therefore he fails to meet the requirements of section
10 2244(b)(2)(B)(i) regarding due diligence or discovery. (Response 15-16.) Respondent
11 further argues that the evidence does not satisfy section 2244(b)(2)(B)(ii), and does not
12 demonstrate Petitioner’s innocence. (Id. at 16.) Respondent concedes that the allegedly
13 new evidence supports Petitioner’s claim that he engaged in self-defense, but argues that
14 the additional evidence would not have “altered the balance of evidence such that no
15 reasonable jury could have convicted” because the trial included conflicting evidence on
16 whether Stamps attacked Petitioner holding a metal pipe. (Id. at 16.)

17 This Court finds that the documents Petitioner submitted along with his First
18 Amended Petition and Reply do not contain any evidence that Petitioner could not have
19 obtained through the exercise of due diligence prior to the submission of his first federal
20 petition. Petitioner admits as much when he states that “[b]etween the dates of Aug. 6,
21 2003, and Sept. 2005, [he] obtained various documents and affidavits and evidence which
22 was not available or admissible for use on direct appeal (NEW EVIDENCE).” (Pet. 37.)
23 The majority of the documents Petitioner submits in support of his claims consist of police
24 reports, witness interviews, and forensic results that were part of the trial record. (See Pet.
25 Exhibits, 1-126 [ECF No. 1-1.] The only new piece of evidence that supports his current
26 claims, according to Petitioner, is the affidavit of Herring. (See Affidavit re Diligence
27 Regarding Testimony of Howard Herring 4 [ECF No. 21].)

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1 Petitioner vigorously argues that he exercised due diligence to the full extent of his
2 abilities by writing letters to trial counsel Douglas Brown urging him to interview Herring,
3 sending Brown information about possible locations to find Herring, requesting counsel ask
4 Herring during trial where he was during the preliminary hearing and whether he made the
5 statements to Detective Rivera attributed to him. (See Affidavit re Diligence Regarding
6 Testimony of Howard Herring 2-3.) Petitioner further contends he requested that counsel
7 obtain a transcript of his prior convictions, and after getting no results from counsel, hired a
8 private investigator who located Herring's mother in Temecula and procured his affidavit,
9 along with the a transcript of his prior convictions. (Id. at 3-4.) In addition, Petitioner has
10 submitted extensive documentation, dated from 2004-2009, detailing his efforts to pursue
11 his claims, including: (1) numerous letters to agencies requesting assistance, including the
12 California Innocence Project and ACLU; (2) correspondence with trial and appellate
13 counsel, including a letter from trial counsel indicating that the defense expert was unable
14 to find Stamps' fingerprints on the pipe; and (3) requests for information pursuant to the
15 Freedom of Information Act. (See Reply Exhibits 25-199.)

16 The Court finds that Petitioner diligently pursued witness Herring, even when he did
17 not receive results from trial counsel. However, it is not enough to be diligent in
18 discovering new evidence. Once a petitioner discovers the factual predicate of new claims,
19 he must put forth these claims in a timely fashion. See Hill, 297 F.3d at 898. Instead, here
20 Petitioner had the affidavit of Herring for almost two years to prepare his claims for
21 ineffective assistance of counsel before he filed his first federal petition. Even after
22 Petitioner submitted his first federal petition, he could have added the claims by amending
23 that petition pursuant to Federal Rule of Civil Procedure 15. See F.R.C.P 15(a) (allowing
24 amendment of petition once as a matter of course prior to a responsive pleading, within 21
25 days of a responsive pleading, or thereafter with leave of court). Petitioner acknowledges
26 that in his attempt to diligently pursue these claims, he mistakenly filed a request for leave
27 to file a second or successive petition in the Ninth Circuit. However, as previously
28 discussed, Petitioner's assertion that the Ninth Circuit should have liberally construed his

1 request as a motion for leave to amend his pending petition and transfer it to this Court
 2 lacks merit. Ultimately, although the Court must construe his pleadings liberally, Petitioner
 3 has not met his burden of demonstrating that this evidence is newly discovered since the
 4 time he filed his federal petition in case number 07cv0752.

5 Moreover, even if the facts asserted in Herring's affidavit were proven and viewed
 6 in light of the evidence as a whole, the evidence does not establish by clear and convincing
 7 evidence that no reasonable factfinder would have found Petitioner guilty of voluntary
 8 manslaughter.⁷ 28 U.S.C. § 2244(b)(2)(ii). As the appellate court noted, a number of
 9 witnesses stated that Stamps was not holding anything in his hands during the altercation,
 10 while Petitioner claimed Stamps had a metal pipe in his hands, and the court of appeal
 11 stated that a pipe was found near Stamps's body. See People v. Goodrum, 2004 WL
 12 1854188, *1-2 (Cal.App. 4 Dist., 2004). The court acknowledged:

13 The focus of the trial and closing arguments was on whether Goodrum was
 14 justified in killing Stamps. The jury evidently gave careful consideration to
 15 the defense evidence; they rejected the prosecution's theory Goodrum had
 16 committed either first or second degree murder and instead found Goodrum
 17 was guilty only of voluntary manslaughter. There is ample evidence in the
 18 record to support the jury's conviction of voluntary manslaughter.

19 Id. at 6.

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21 ⁷In Herring's affidavit, he states he was interviewed by San Diego Police Detective Maria Rivera, on
 22 September 25, 2002, about the shooting involving Petitioner and victim Stamps. (Pet. Exhibit A at 3.) Herring
 23 claims he told Rivera that Stamps was hiding a metal pipe behind his back "when he charged up to Mr.
 24 Goodrum" at the time Petitioner shot Stamps. (Id.) When Rivera spoke to Herring, a warrant was outstanding
 25 for his arrest, so Herring stated that he used his brother's name during the interview. (Id. at 3.) When Rivera
 26 discovered his true name, she threatened to charge him with perjury for falsely identifying himself to a police
 27 officer. (Id.) During Rivera's second interview with Herring on October 2, 2002, she recorded the conversation
 28 and allegedly became hostile to Herring when he stated that Stamps held the pipe during the altercation, saying
 he had not told her that before. (Id. at 4.) According to Herring, he was arrested shortly thereafter and while
 he was in jail, Edward Sergott, the District Attorney's Supervising Investigator, came to see him and offered
 Herring an early release, participation in a treatment facility and money if Herring did not testify in Petitioner's
 case. (Id. at 5.) Herring stated that he agreed not to testify, was released from jail, and entered drug treatment
 at "Set Free Ranch." (Id. at 6.) While on a five day pass, Herring claims he was arrested and while he was in
 jail, Sergott and the Deputy District Attorney, N. Cooper, visited him in jail and told him that he would be
 served with a subpoena requiring him to testify, but that he should not "mention the pipe being in Mr. Stamps
 hand when he got shot because I would 'piss-off' the detective." (Id.) On January 4, 2003, Herring was
 released from jail and returned to "Set Free Ranch," where Sergott and Cooper visited him. (Id. at 6.) Sergott
 and Cooper instructed him that Rivera would not charge Herring with perjury if he did not testify that Stamps
 was holding the pipe in his hand, warning him to "watch it" and not add anything unnecessary to his testimony.
 (Id.) Herring testified on February 25 and 26, 2003, stating that he "didn't have a good view of Mr. Stamps"
 and that he did not see the pipe in his hand when he was shot. (Id. at 7.)

1 In light of all the information, Petitioner has not demonstrated that the information
 2 contained within Herring's affidavit about Stamps advancing toward Petitioner with a metal
 3 pipe at the time he was shot, and the alleged police department misconduct, would have
 4 tipped the balance to the extent that no reasonable factfinder would have found him guilty
 5 of voluntary manslaughter. For the foregoing reasons, the Court finds Petitioner fails to
 6 establish that he has discovered new evidence which demonstrates he suffered an
 7 unconstitutional conviction and therefore, he cannot meet the standard set forth in section
 8 2244 to proceed with a successive petition in this Court.

9 **2. Ground Two- Unlawful Sentence Enhancement**

10 In Ground Two, Petitioner claims that his sentence is unlawful because : (1) the
 11 sentence enhancements were illegal because his prior conviction was reduced to a
 12 misdemeanor when he was committed to the California Youth Authority, and (2) his
 13 sentence violates the terms of his 1981 negotiated plea stating that his 1981 conviction
 14 would be treated as a misdemeanor. (Pet. 140.) Petitioner claims he has acquired new
 15 evidence which supports this claim. In his Reply, Petitioner outlines the chronological
 16 history regarding when he obtained the documents that support this claim, beginning in
 17 July 2003, with the receipt of a letter from his appellate counsel, and concluding with a
 18 letter Petitioner received from trial counsel in December 2004. (Reply 33.) Petitioner also
 19 claimed that neither trial counsel or appellate counsel had his priors transcript, but that a
 20 retained investigator he was able to locate it in March 2004. (*Id.* at 34.)

21 Respondent counters that "the operative facts for ground two all involve either (1)
 22 the nature of his conviction and pleas bargain related to the 1981 conviction, or (2) the
 23 characterization and use of that conviction to increase his current sentence." (Response at
 24 13-14.) According to Respondent, Petitioner knew all the relevant facts pertaining to this
 25 claim before his state conviction became final, and in advance of his filing the first petition
 26 in this Court in 2007, and the information cannot qualify as "new" evidence under 28
 27 U.S.C. 2244 (b)(2)(B). (*Id.* at 14.) As claims raised in a second or successive petition also
 28 must demonstrate "innocence of the underlying offense," Respondent argues that facts that

1 speak only to the propriety of the sentence and are “unrelated to guilty or innocence” are
2 outside the scope of section 2244, citing Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th
3 Cir. 1997). (Id. at 18.)

4 The evidence cited here is not newly discovered, as it is clear Petitioner acquired the
5 evidence between 2003 and 2004, well before filing his federal petition in 2007. Although
6 the Court finds that Petitioner acted with industry and diligence in procuring his priors
7 transcript by hiring a private investigator when trial counsel failed to locate the records, he
8 did not utilize that information to bring his present challenge for almost three years. In
9 addition, the reasoning of Greenawalt is persuasive in light of the fact that section
10 2244(b)(2)(b) requires not just that a prisoner demonstrate the evidence is newly
11 discovered, but that such evidence can prove he is not guilty of the charged crime. Such an
12 inquiry goes only to guilt or innocence, not claims related to sentencing as this claim does.
13 See Greenawalt, 105 F.3d at 1277. Accordingly, Petitioner has not met the threshold
14 requirement of section 2244(b)(2)(B) for filing a second or successive petition containing
15 this claim.

16 3. Ground Three- Cumulative Error

17 Petitioner contends that counsel made multiple errors in the pre-trial and trial stages
18 of his case, and because it was a close case, the cumulative effect of the errors resulted in
19 his conviction. (Pet. 160.) According to Goodrum, his trial counsel’s ineffective assistance
20 “left him powerless and unarmed against [sic] the prosecutions perjury, evidence
21 destruction and fabrication” and that he was arrested, arraigned and tried as a result of those
22 multiple errors. (Reply 27.) Respondent argues that this claim does not rely on any
23 evidence that was not available prior to Petitioner’s filing of the petition in case number
24 07cv0752 in 2007, and therefore, Petitioner cannot qualify for filing a second or successive
25 petition. (Response at 17.)

26 In light of the finding that Petitioner has not demonstrated the evidence supporting
27 his ineffective assistance of counsel claim or illegal sentence enhancement claim is newly
28 discovered, he cannot proceed on a claim of cumulative error in a successive petition.

1 **C. Actual Innocence**

2 Petitioner argues that he is actually innocent of the crime of voluntary manslaughter,
3 and that his Sixth Amendment right to effective assistance of counsel was violated due to
4 multiple trial counsel errors. (Reply 9.) Although he has not developed this argument in
5 great detail, Petitioner contends that his claims can meet the gateway standard of Schlup
6 because he is asserting that “he is actually innocent of the crime and enhancements for
7 which he is convicted,” and asserts a constitutional violation. (*Id.* at 9.) Petitioner notes it
8 is unclear whether the standard of section 2244(b)(2)(B)(i)&(ii) or Schlup applies to
9 successive claims. (*Id.*)

10 It is unclear whether a federal habeas court must analyze Petitioner’s claims under
11 both section 2244 and Schlup in a case in which the appellate court has granted leave for
12 the petitioner to file a second or successive petition that includes a claim of actual
13 innocence. *See Cooper v. Woodford*, 358 F.3d 1117, 1118-19 (9th Cir. 2004) (court
14 refrained from deciding whether Schlup standard or standard of 28 U.S.C. § 2244(b)(2)(B)
15 applied where capital prisoner requested permission to file second or successive petition
16 that raised claim of actual innocence along with Brady claim, finding under either standard
17 petitioner was entitled to file successive petition). In an abundance of caution, the court
18 will do as other courts have done and conduct the analysis under the Schlup standard, in
19 addition to the above discussion of section 2244(b)(2)(B).

20 In Schlup, the petitioner claimed he was actually innocent of the murder for which
21 he was convicted, and that his conviction was obtained as a result of the withholding of
22 evidence by the prosecution in violation of Brady, and in violation of his right to the
23 effective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984).
24 Schlup, 513 U.S. at 307. The Court noted that because the petitioner had failed to establish
25 cause and prejudice sufficient to overcome a procedural default, he would be able to
26 “obtain review of his constitutional claims only if he falls within the ‘narrow class of cases
27 . . . implicating a fundamental miscarriage of justice.’” *Id.* at 314-15, quoting McCleskey
28 *v. Zant*, 499 U.S. 467, 494 (1991). The Schlup Court noted that because the claim for relief

at issue “depends critically on the validity of his Strickland and Brady claims . . . Schlup’s claim of innocence is thus ‘not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.’” Schlup, 513 U.S. at 315, quoting Herrera v. Collins, 506 U.S. 390, 404 (1993) (same). The Supreme Court has therefore made clear that an assertion of actual innocence is not itself a constitutional claim, but a gateway available to have otherwise barred claims considered on the merits. Id.; see also House v. Bell, 547 U.S. 518, 539 (2006) (noting that the case at hand involved a “federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence.”)

“In order to pass through Schlup’s gateway, and have an otherwise barred constitutional claim heard on the merits, a petitioner must show that, in light of all the evidence, including evidence not introduced at trial, ‘it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.’” Majoy v. Roe, 296 F.3d 770, 775-76 (9th Cir. 2003), quoting Schlup, 513 U.S. at 327. The inquiry requires more than the court determining whether it has confidence in the outcome of the trial. Johnson v. Knowles, 541 F.3d 933, 937 (9th Cir. 2008). Passage through the narrow Schlup portal, “requires a petitioner ‘to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.’” Lee v. Lampert, 653 F.3d 929, 938 (9th Cir. 2011) , citing Schlup, 513 U.S. at 324).

The Ninth Circuit has noted that:

The AEDPA requirements for a second or successive application are stricter than the Schlup standard in two ways. First, § 2244(b)(2)(B)(i) requires that ‘the factual predicate for the claim could not have been discovered previously through the exercise of due diligence.’ There is no requirement under Schlup that the factual claim was not discoverable through the exercise of due diligence. Second, § 2244(b)(2)(B)(ii) requires that ‘the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish *by clear and convincing* evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.’ (Emphasis added.) Schlup requires only that an applicant show that it is ‘more likely than not’ that no reasonable fact-finder would have found him guilty.

1 Cooper v. Woodford, 358 F.3d 1117, 1119 (9th Cir. 2004).

2 Petitioner's assertion that he is making a "gateway" claim under Schlup is correct
3 because he is alleging that he received ineffective assistance of counsel in violation of his
4 constitutional rights, and he claims he is actually innocent of voluntary manslaughter. See
5 Cooper, 358 F.3d at 1119. While Petitioner devotes little more than two short sentences
6 addressing his claim of actual innocence, he contends that he obtained evidence between
7 2003 and 2005 which demonstrates that he should have his claims considered by the court
8 because the evidence shows he was not guilty of voluntary manslaughter, but instead
9 should have been found guilty of justifiable homicide. (Pet. 37; Reply 19, 20-21.) For
10 purposes of a Schlup claim, the Court must consider the evidence presented at trial, and any
11 newly discovered evidence, regardless of its admissibility, in order to determine whether
12 Petitioner has shown that it is more likely than not that no reasonable fact-finder would
13 have found him guilty. Schlup, 513 U.S. at 327.

14 Here, none of the evidence available at trial, or contained within Petitioner's current
15 pleadings, meets the more lenient Schlup standard. The evidence presented here, in
16 consideration with that at trial, fails to show that it was more likely than not no reasonable
17 fact-finder would have found him guilty. While there was sufficient evidence indicating a
18 metal pipe was found beneath the victim, witnesses provided contradictory information
19 concerning whether Stamps held the pipe as he advanced on Petitioner. Moreover, the
20 victim was shot at close range as he approached Petitioner, and the jury declined to find
21 Petitioner guilty of first or second degree murder, implicitly recognizing mitigating factors
22 including self defense in its reduction of the conviction to voluntary manslaughter.

23 Significantly, Petitioner has openly and consistently admitted he shot and killed
24 Stamps, and now argues he is not guilty of the degree of homicide for which he was
25 convicted as a result of counsel's failures, and therefore the Court cannot have confidence
26 in the outcome of his trial. However, "[t]o ensure that the fundamental miscarriage of
27 justice exception would remain 'rare' and would only be applied in the 'extraordinary
28 case,' while at the same time ensuring that the exception would extend relief to those who

were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioners innocence.” Schlup, 513 U.S. at 321. Here, Petitioner does not claim he is actually innocent of homicide, but only asserts that his new evidence demonstrates that he was not guilty of voluntary manslaughter. In Johnson, the petitioner conceded his guilt, but attempted to argue that he was entitled to proceed through the Schlup gateway because the court could not have confidence in the outcome of the proceedings due to ineffective assistance of counsel. 541 F.3d 935. The Ninth Circuit held that petitioner’s admission of guilt was fatal to his untimely habeas petition because the miscarriage of justice exception is limited to “extraordinary cases where the petitioner asserts his innocence and establishes that the court cannot have confidence in the contrary finding of guilt” noting that “[a] petitioner who asserts only procedural violations without claiming actual innocence fails to meet [the Schlup] standard.” Johnson, 541 F.3d at 937.

Just as the petitioner in Johnson, Petitioner here has admitted his guilt and therefore, fails to demonstrate he suffered a miscarriage of justice. In addressing Petitioner’s ineffective assistance of counsel claim, the California Court of Appeal similarly held:

Goodrum’s assertions are speculative and not supported by the record or by his exhibits. Goodrum does not deny he shot Stamps twice with a rifle at close range. . . . Goodrum has not shown that absent the purported errors by counsel he would have obtained a better result or that there was a miscarriage of justice.

See In re Goodrum, D047569, slip op. 2, June 29, 2006.

The Court is confident in the outcome of the trial, and also finds that “no reasonable juror would have found petitioner guilty beyond a reasonable doubt” in light of all the evidence including the new evidence he tenders in support of the new claims. Accordingly, his petition cannot proceed through the Schlup gateway, and is **DISMISSED**. See Schlup, 513 U.S. at 327.

D. Evidentiary Hearing Request

Petitioner requests an evidentiary hearing to further develop the factual basis for his claims because he is alleging facts, which if proven, would entitle him to relief under section 2254.

(Reply 14.)

The United States Supreme Court, in Cullen v. Pinholster, 563 U.S. ___, 131 S. Ct. 1388, 1398 (2011), stated that a federal habeas court’s review of a state court adjudication under 28

1 U.S.C. § 2254(d)(1) “is limited to the record that was before the state court that adjudicated the
2 claim on the merits.” Id. Thus, new evidence presented at an evidentiary hearing in federal court
3 cannot be considered in assessing whether a state court decision
4 was contrary to, or involved an unreasonable application of, clearly established federal law under
5 § 2254(d)(1). Id. Accordingly, Petitioner cannot further develop any facts supporting his claim of
6 ineffective assistance of counsel or improper sentence enhancement in this Court through an
7 evidentiary hearing. The Court **DENIES** Petitioner’s request for an evidentiary hearing.

8 **E. Request for Discovery of Law Enforcement Officers**

9 Petitioner requests information regarding twenty law enforcement officers or forensic
10 specialists seeking contact information for people who have filed complaints with the police
11 department alleging acts “involving morally lax character, unnecessary violent acts of aggressive
12 behavior, acts of violence and/or attempted violence, acts of excessive force and /or attempted
13 excessive force, perjury and/or attempted perjury, falsifying official reports and /or attempted
14 fabrication of official reports and destroying evidence and/or attempted destruction of evidence.”
15 (Motion for Discovery 2 [ECF No. 5].)

16 In light of the foregoing, Petitioner fails to establish entitlement to proceed with his
17 successive petition asserting ineffective assistance of counsel, illegal sentence enhancement and
18 cumulative error, which he seeks discovery to support. Accordingly, the Court **DENIES**
19 Petitioner’s discovery motion as moot.

20 **IV. CONCLUSION AND ORDER**

21 For all the foregoing reasons, the Court finds Petitioner has failed to satisfy the
22 requirements of 28 U.S.C. section 2244(b)(2)(B) for proceeding in this Court with claims raised in
23 a second or successive petition, Petitioner has failed to satisfy the Schlup standard to avoid §
24 2244(b)(2)(B), has failed to demonstrate that he is entitled to an evidentiary hearing, and his
25 request for discovery concerning law enforcement officers is moot. Accordingly, the Court

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1 **DISMISSES** the current Petition with prejudice and without leave to amend, **DENIES** Petitioner's
2 request for an evidentiary hearing, and **DENIES** Petitioner's request for discovery of law
3 enforcement personnel files.

4 **DATED: June 13, 2012**

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6 **IRMA E. GONZALEZ, Chief Judge**
7 **United States District Court**
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